No. 75-1211

In the Supreme Court of the United States

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OWENSBORO-DAVIESS COUNTY HOSPITAL, ET AL., PETITIONERS

v.

W. J. USERY, JR., SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 523 F.2d 1013. The findings of fact and conclusions of law of the district court (Pet. App. 35a-41a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1975. A timely petition for rehearing with suggestion of rehearing *en banc* was denied on December 2, 1975. The petition for a writ of certiorari was filed on February 24, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether female aides and male orderlies who assist the nursing staff at petitioners' hospital perform work that is "equal" within the meaning of the Equal Pay Act of 1963.

STATUTE INVOLVED

Section 3 of the Equal Pay Act of 1963, 77 Stat. 56, an amendment to the Fair Labor Standards Act of 1938, 52 Stat. 1060 *et seq.*, as amended, 29 U.S.C. 206(d), is set forth in relevant part at Pet. 4.

STATEMENT

This action was brought by the Secretary of Labor in the United States District Court for the Western District of Kentucky to enjoin petitioners Owensboro-Daviess County Hospital, the City of Owensboro, and the County of Daviess from violating Section 3 of the Equal Pay Act of 1963, 29 U.S.C. 206(d), by paying female nursing aides at the hospital less than male orderlies for substantially equal work. Petitioner[1] denied that the aides and orderlies performed equal work, claiming that the orderlies' duties required greater skill, effort and responsibility. At the close of the Secretary's evidence, the district court, *sua sponte*, entered judgment for petitioner (Pet. App. 3a). The court of appeals reversed and remanded the case for further proceedings, concluding that several of the district court's critical findings of fact were clearly erroneous (Pet. App. 4a). The petition for a writ of certiorari seeks review of that remand order.

The evidence at trial showed that, during the period covered by this action, petitioner employed 30 to 40 male nursing assistants (orderlies) and 160 to 180 female nursing assistants (aides) and that the orderlies were paid

[1]"Petitioner" hereinafter refers to Owensboro-Daviess County Hospital.

approximately 25 cents per hour more than aides with comparable experience (Pet. App. 6a; A. 91).[2] It was undisputed that aides and orderlies attended the same four-week training course and, with one exception,[3] received identical instruction (Pet. App. 5a; A. 301-302) and that they performed the same basic patient care duties, except to the extent that their duties differed because of shift assignments (Pet. App. 25a-27a; A. 97-100, 297-299).

The routine duties common to both aides and orderlies included taking vital signs (oral and rectal temperatures, pulse, respiration and blood pressure); measuring and recording the patient's intake and output; preparing patients for surgery; bringing and emptying bed pans; collecting specimens; assisting male patients with urinals; assisting with the admission, transfer and discharge of patients, and orienting the patient to hospital surroundings; discontinuing subcutaneous and intravenous injections under the supervision of a nurse; giving baths, enemas, and post mortem care; weighing patients; applying dressings, compresses, hot water bottles and ice bags; cleaning incontinent patients; performing clinitests and

[2]"A." refers to the appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court. The wage differential varied from 20 to 25 cents per hour and was only 15 cents for aides and orderlies with less than three months' experience.

[3]Aides hired after October 1968 received no training in catheterization procedures. Prior to that time, they were trained to catheterize female patients (A. 100, 106, 123, 126, 168-169, 242-243, 273-274) and the aides, most of whom were hired prior to October 1968 (A. 279-280), continued to perform this duty until instructed otherwise on October 1, 1972—four weeks before trial (A. 109-114, 126, 145-146, 152-153, 160, 221, 242-243, 264-265, 286-287). Significantly, aides were paid 20 and 25 cents per hour less than orderlies before as well as after October 1968 (A. 91).

acetests; reporting observations and patient complaints to the nurse; assisting patients in getting into and out of bed; turning patients; irrigating bladders; reinforcing dressings; performing sterile soaks for cataract patients; unstopping catheters to take clinney and urine tests; answering signal lights; assisting with oxygen therapy; cleaning equipment; performing housekeeping chores; and (until October 1972) inserting catheters (A. 72-94, 99-101, 108-116, 118, 121-122, 126, 129, 141-143, 145-147, 150-151, 161-162, 172-179, 191, 200-202, 219-224, 226, 228-230, 243-246, 254-255, 269-270, 274, 276-277, 280-281, 284-287, 293-294). Aides also gave douches and perineal care (A. 82), made beds each morning, served meal trays, and assisted with feeding patients (A. 140, 156, 217-219); orderlies also made beds after patients had been discharged and for patients in orthopedics (A. 195, 237-242, 249), changed bedding for incontinent male patients (A. 212), and performed catheterizations.[4]

Although the job descriptions indicated that orderlies, but not aides, were required to perform sterile procedures, lift heavy patients, set up traction, cut casts, restrain unruly patients and move heavy oxygen tanks, the evidence clearly indicated that aides performed these or similar tasks with some frequency and that many orderlies had not performed these functions with any regularity. For exam-

[4]The six orderlies assigned to X-Ray, Physical Therapy and Central Supply performed no catheterizations or other sterile procedures (A. 43,-44, 47-48). Although the trial court found that an orderly typically inserted 5 to 6 catheters a day, there is nothing in the record to support that conclusion. Only one orderly testified as to the number of catheterizations personally performed (A. 176) and, as the court of appeals noted (Pet. App. 12a), that witness "contradicted himself not only about the number of * * * catheterizations he performed each day, but also about the length of time it took him to perform them." See A. 177-179.

ple, aides normally performed sterile procedures (such as bladder irrigations, eye soaks, and dressing changes); did catheterizations until October 1972; assisted with heavy patients (Pet. App. 13a; A. 120, 141, 226-227, 258); helped to restrain violent and unruly patients (Pet. App. 23a-24a; A. 129-130, 136, 143-144, 183, 258, 269-270); carried oxygen tanks from the basement when necessary (Pet. App. 22a; A. 147-148, 204, 250-251, 257-258, 288); set up and adjusted traction and assisted orderlies in these procedures (Pet. App. 19a-22a; A. 128, 136-137, 180-181, 196-198, 224-225, 231-234, 266); and answered signal calls from patients, which serve a function similar to the "stat" (emergency) calls to which orderlies must respond (A. 124, 135-136, 290-293).

ARGUMENT

The decision below is correct, is in accord with the decisions of other courts, and presents an essentially factual question not warranting review by this Court.

1. The court of appeals correctly concluded that the district court erred in dismissing the Secretary's complaint,[5] since "it is now well settled that jobs need not be identical in every respect before the Equal Pay Act is applicable * * *." *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 203, n. 24. It is sufficient if the jobs are closely related, require substantially "equal skill, effort and responsibility," and are performed under "similar working conditions." See *Brennan* v. *City Stores, Inc.*, 479 F.2d 235, 238 (C.A. 5); *Hodgson* v. *Miller Brewing Co.*, 457

[5]Contrary to petitioner's contention (Pet. 21), the court of appeals did not exceed its powers in determining that several of the district court's findings of fact were clearly erroneous and that the district court had applied an improper standard of "equal work." See Fed. R. Civ. P. 52(a); *Baumgartner* v. *United States*, 322 U.S. 665, 671; *Idaho Metal Works* v. *Wirtz*, 383 U.S. 190, 199, 201.

F. 2d 221, 227 (C.A. 7); *Hodgson* v. *Fairmont Supply Co.*, 454 F. 2d 490, 493 (C.A. 4); *Shultz* v. *American Can Co.—Dixie Products*, 424 F. 2d 356, 360 (C.A. 8); *Shultz* v. *Wheaton Glass Co.*, 421 F. 2d 259, 265 (C.A. 3), certiorari denied, 398 U.S. 905.

As the evidence outlined above indicates, the aides and orderlies employed by petitioner performed essentially identical routine tasks, depending on the shift to which they were assigned (Pet. App. 25a-28a).[6] Moreover, the few duties not performed by any aide — *e.g.*, the transportation of linen from the basement, the occasional removal of casts, and the duty to answer "stat" calls — were insufficient to render the jobs unequal for purposes of the Act either because they "require[d] no special skill, effort, or responsibility" (Pet. App. 27a), were performed infrequently (Pet. App. 27a-28a), or were essentially no different from corresponding duties performed only by aides (Pet. App. 28a). See *Brennan* v. *Prince William Hospital Corp.*, 503 F. 2d 282 (C.A. 4), certiorari denied, 420 U.S. 972; *Hodgson* v. *Behrens Drug Co.*, 475 F. 2d 1041, 1050 (C.A. 5), certiorari denied, 414 U.S. 822; *Hodgson* v. *Corning Glass Works*, 474 F. 2d 226, 234 (C.A. 2), affirmed, 417 U.S. 188.

2. Petitioner contends (Pet. 19), however, that the decision below and similar rulings by other courts of appeals are based upon a "misinterpretation of the legislative history" of the Equal Pay Act and that that history shows that Congress, when it required equal pay for "equal work," intended the word "equal" to mean "substantially identical." To the contrary, we submit that

[6]Contrary to *amicus'* assertion (Br. 13), the court of appeals specifically considered whether the two jobs involved substantially the same duties (Pet. App. 27a-28a).

the court of appeals properly interpreted the legislative history as reflecting an intention to provide equal pay for men and women as long as their work was "substantially" equal, and that petitioner's interpretation "would destroy the remedial purpose of the Act." *Shultz* v. *Wheaton Glass Co., supra*, 421 F. 2d at 265.

Congress intended the equal pay provisions to apply where men and women are employed in the same or closely related jobs and do "substantially the same work" (Hearings on the Equal Pay Act, H.R. 3861 and Related Bills before the Special Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 1st Sess., p. 240 (1963)). Thus, after noting that portions of the House debates would support the interpretation that only "identical" jobs were covered, Senator McNamara, Chairman of the Senate Labor Subcommittee and sponsor of the Senate bill, stated "[I]t is most important that the Senate intent be made clear as to language in the bill which is the same in both Senate and House versions," since "[t]he discussion that surrounded the congressional consideration of this bill has somewhat clouded the question of the definition of 'equal skills, efforts, and responsibilities' " (109 Cong. Rec. 9761 (1963)). Senator McNamara remarked that the Senate Report contained "a rather lengthy discussion * * * on the methods and procedures which the Department should utilize to determine which jobs do involve equal skills, efforts and responsibilities and that the Report thus "makes it clear that it is not the intent of the Senate that jobs must be identical. * * * Based on some of the discussion which has taken place, these jobs [which involve equal skills, efforts and responsibilities] would not be considered equal because they are not identical, and such a conclusion would be obviously ridiculous" (*ibid.*).

Petitioner argues (Pet. 17-18) that this clear explanation by one of the bill's sponsors, together with the entire Senate debate, must be disregarded because the Senate bill was "scrapped" for "an entirely different * * * House-passed bill" (Pet. 18). This is incorrect. S. 1409, the bill that passed the Senate, and H.R. 6060, whose text was substituted for it by the House, are virtually identical. The only differences between the two bills (set forth in full at 109 Cong. Rec. 9217-9218 (1963)) are on matters irrelevant to the issues in this case.[7] In accepting the House version, the Senate was not "capitulating", as petitioner suggests (Pet. 18), but simply agreeing to it. Indeed, the remarks of Senator McNamara are entitled to added significance in view of the "conflicting statements" of the House sponsors of the bill. *Corning Glass Works* v. *Brennan, supra,* 417 U.S. at 197-198.

3. Contrary to petitioner's contention (Pet. 12-16), the decision below does not conflict with *Hodgson* v. *Golden Isles Nursing Convalescent Homes, Inc.*, 468 F. 2d 1256 (C.A. 5), on the issue whether female aides and male orderlies perform equal work. In *Golden Isles,* which involved a geriatric nursing home rather than a hospital, the court held that, on the facts of that particular case, male orderlies did not perform work that was substantially equal to that of female aides. The dissimilar results in *Golden Isles* and the present case reflect solely the differences between the particular functions performed

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[7]Section 3 of the House substitute added language forbidding union attempts to cause an employer to violate the Act. It also stated that pay differentials caused by a merit, seniority, or piecework system do not violate the Act. The Senate bill contained a general section, retained in the House version, permitting any differential "based on any factor * * * other than sex."

by the male and female attendants in the two cases. Indeed, in its subsequent decision in *Hodgson* v. *Brookhaven General Hospital,* 470 F. 2d 729, holding that male orderlies and female aides performed substantially equal work and were entitled to equal pay, the Fifth Circuit distinguished its *Golden Isles* decision on that factual ground.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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